

No. 391571-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DIVISION I

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STATE OF WASHINGTON

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MORCOS BROTHERS, INC.,  
NADER MORCOS, and NABIL MORCOS,

Appellants,

v.

MERIDIAN PLACE LLC and  
GREG STEIN,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE MICHAEL HECHT

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BRIEF OF RESPONDENTS

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ISSUES ON APPEAL .....	1
III.	RESTATEMENT OF THE CASE.....	2
	A. Restatement Of Facts. ....	2
	1. Execution Of The Lease.....	4
	2. The Parties’ Actions Or Inactions To Prepare For Occupancy And Operation.....	7
	3. Completion Of Landlord’s Work, Lease Commencement; Default And Relinquish- ment Of Space.....	13
	B. Proceedings Below.....	15
	1. Oral Findings and Conclusions.....	15
	2. Pending Criminal Investigation of Judge Hecht. ....	16
IV.	ARGUMENT .....	17
	A. The Trial Court’s Incorporation Of Its Oral Findings And Conclusions Is Sufficient To Permit Appellate Review.....	17
	1. The Morcos Brothers Have Waived Their Demand For Remand For Written Formal Findings.....	17
	2. The Trial Court’s Judgment Was Its Final Decision On The Merits.....	18

3.	The Trial Court's Oral Decision, Which Was Expressly Adopted By The Trial Court In Its Judgment, Provides A Sufficient Record For This Court To Address The Merits Of The Morcos Brothers' Challenge On Appeal. ....	20
B.	The Court Properly Denied A New Trial Where The Morcos Brothers Made No Showing of Irregularity, Failure To Do Substantial Justice, Or Prejudice. ....	25
1.	The Morcos Brothers Waived The Challenge To The Trial Court's Capacity To Fairly Consider The Case By Waiting Until After Judgment Was Entered Before Raising The Issue. ....	25
2.	This Court Reviews The Denial of A New Trial For Abuse of Discretion. ....	27
3.	The Morcos Brothers Established No Basis For A New Trial. ....	27
C.	The Trial Court Properly Interpreted The Lease, Finding That The Landlord Delivered the Premises On The October 1 Delivery Date. ....	31
D.	Morcos Inc. Did Not Prove That Meridian Committed A Material Breach Of The Lease Excusing Morcos Inc.'s Failure To Perform Or That It Was Entitled To An Offset For Tenant Improvements. ....	39
E.	The Trial Court Properly Dismissed Morcos Inc.'s Claim For Rescission Based On Fraud. ....	43
F.	Meridian, Not Morcos Inc., Is Entitled To Attorney's Fees As Prevailing Party. ....	47
V.	CONCLUSION. ....	47

## TABLE OF AUTHORITIES

### CASES

<i>Aluminum Co. of America v. Aetna Cas. &amp; Sur. Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000) .....	27
<i>Backlund v. University of Washington</i> , 137 Wn.2d 651, 975 P.2d 950 (1999).....	23
<i>Baxter v. Greyhound Corp.</i> , 65 Wn.2d 421, 397 P.2d 857 (1964) .....	30
<i>Bland v. Mentor</i> , 63 Wn.2d 150, 385 P.2d 727 (1963).....	3
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	3
<i>Carkonen v. Columbia &amp; P.S.R. Co.</i> , 102 Wash. 11, 172 Pac. 816 (1918) .....	27
<i>Colorado Structures, Inc. v. Insurance Co. of the West</i> , 161 Wn.2d 577, 167 P.3d 1125 (2007) .....	32
<i>Commonwealth v. Hewett</i> , 380 Pa. Super. 334, 551 A.2d 1080 <i>app. denied</i> , 522 Pa. 583 (1988) .....	28
<i>Crown Plaza Corp. v. Synapse Software Systems, Inc.</i> , 87 Wn. App. 495, 962 P.2d 824 (1997) .....	36
<i>DGHI, Enterprises v. Pacific Cities, Inc.</i> , 137 Wn.2d 933, 977 P.2d 1231 (1999).....	18-20
<i>Dependency of B.S.S.</i> , 56 Wn. App. 169, 782 P.2d 1100 (1989), <i>rev. denied</i> , 114 Wn.2d 1018 (1990).....	18
<i>Dependency of Schermer</i> , 161 Wn.2d 927, 169 P.3d 452 (2007) .....	44
<i>Detrick v. Garretson Packing Co.</i> , 73 Wn.2d 804, 440 P.2d 834 (1968).....	27

<i>Draper Machine Works, Inc. v. Hagberg</i> , 34 Wn. App. 483, 663 P.2d 141 (1983).....	36
<i>Ford v. Bellingham-Whatcom County Dist. Bd. of Health</i> , 16 Wn. App. 709, 558 P.2d 821 (1977).....	21
<i>Hargis v. Mel-Mad Corp.</i> , 46 Wn. App. 146, 730 P.2d 76 (1986).....	41-42
<i>Knudsen v. Patton</i> , 26 Wn. App. 134, 611 P.2d 1354, rev. denied, 94 Wn.2d 1008 (1980) .....	21
<i>Kramer v. J.I. Case Mfg. Co.</i> , 62 Wn. App. 544, 815 P.2d 798 (1991).....	30
<i>Marriage of Booth</i> , 114 Wn.2d 772, 791 P.2d 519 (1990).....	22, 24
<i>Mayer v. Pierce County Med. Bureau, Inc.</i> , 80 Wn. App. 416, 909 P.2d 1323 (1995).....	32
<i>Morris v. Nowotny</i> , 68 Wn.2d 670, 415 P.2d 4 (1966).....	29
<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 70 P.3d 125 (2003).....	3
<i>Peoples Nat. Bank of Washington v. Birney's Enterprises, Inc.</i> , 54 Wn. App. 668, 775 P.2d 466 (1989).....	22
<i>Platts v. Arney</i> , 50 Wn.2d 42, 309 P.2d 372 (1957).....	43
<i>Shelden v. Department of Licensing</i> , 68 Wn. App. 681, 845 P.2d 341 (1993).....	22, 23
<i>Sherman v. Kissinger</i> , 146 Wn. App. 855, 195 P.3d 539 (2008).....	40
<i>Skagit State Bank v. Rasmussen</i> , 109 Wn.2d 377, 745 P.2d 37 (1987).....	46
<i>State v. Helsel</i> , 61 Wn.2d 81, 377 P.2d 408 (1962) .....	23

<i>State v. Kingman</i> , 77 Wn.2d 551, 463 P.2d 638 (1970).....	24
<i>State v. R.J. Reynolds Tobacco Co.</i> , 151 Wn. App. 775, 211 P.3d 448 (2009).....	32
<i>Stranberg v. Lasz</i> , 115 Wn. App. 396, 63 P.3d 809 (2003).....	32
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 343 P.2d 183 (1959).....	41
<i>Williams &amp; Mauseth Ins. Brokers, Inc. v. Chapple</i> , 11 Wn. App. 623, 524 P.2d 431 (1974) .....	26
<i>Willis v. Simpson Inv. Co.</i> , 79 Wn. App. 405, 902 P.2d 1263 (1995).....	44

#### RULES AND REGULATIONS

CR 41 .....	43-44
CR 50 .....	44
CR 52 .....	17, 19
CR 63 .....	19
RAP 18.1.....	47

## **I. INTRODUCTION**

In a judgment that incorporated specific findings, the trial court determined that appellant Morcos Brothers Inc. [“Morcos Inc.”], as tenant, breached a commercial lease with respondent Meridian Place LLC [“Meridian”]. Even a cursory review of the record demonstrates that the trial court’s findings and conclusions are well supported.

After unsuccessfully asking the trial court for reconsideration, Morcos Inc. urged another superior court judge to order a new trial, alleging that during the trial, Judge Michael Hecht was the subject of an ongoing criminal investigation. The successor judge properly denied the motion because Morcos Inc. failed to demonstrate any prejudice, irregularity or error. This court should affirm the judgment below, and award Meridian fees on appeal.

## **II. ISSUES ON APPEAL**

A. Where the trial court incorporated specific findings from its oral decision into its final judgment, and those findings are sufficient to permit appellate review of the decisions below, does the failure to enter separate written findings require reversal?

B. Where Morcos Inc. failed to identify any irregularity or appearance of bias must this Court vacate and order a new trial as a result of a criminal investigation involving the trial judge?

C. Did the trial court properly construe a commercial lease to provide for a Delivery Date permitting tenant improvements to be commenced, prior to the completion of all landlord's work on the premises?

D. Where Morcos Inc.'s breach was the cause of its own damage and Meridian did not receive the benefit of its bargain under the lease, did the trial court properly deny Morcos Inc.'s request that a tenant improvement allowance of \$87,000 be offset against Meridian's damages?

E. Did the trial court, in a bench trial and after completion of Morcos Inc.'s case, properly dismiss Morcos Inc's claim for fraud based upon the plaintiffs' claim that they did not understand the lease before signing it?

F. Are Meridian and Stein entitled to an award of attorneys fees on appeal?

### **III. RESTATEMENT OF THE CASE**

#### **A. Restatement Of Facts.**

On August 1, 2006, Greg Stein on behalf of Meridian, and Nabil Morcos and Nader Morcos [collectively, the "Morcos Brothers," which includes Morcos Inc. as appropriate in context], on behalf of Morcos Inc., met to finalize a shopping center lease between Meridian as "Landlord" and Morcos Inc. as "Tenant." RP I 70, 81-82; RP VI 686-87. Nabil

Morcos was president of Morcos Inc., RP II 199, and Nader Morcos, his brother, was vice president, RP II 200. Nabil signed the lease on behalf of the corporation and both signed personal guaranties of the lease obligations. The trial court determined that the lease is enforceable according to its terms, that Meridian performed under the lease, and that Morcos Inc. breached the lease. CP 283-86.

The appellants' statement of the case relies solely on their own disputed testimony, and disregards the substantial contrary evidence found to be credible by the trial court, in contravention of the settled principle that an appellate court must defer to the trier of fact in reviewing the persuasiveness of the evidence. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). *See also, Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) (“[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.”). In determining the sufficiency of the evidence to sustain the trial court's findings, the appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). This restatement of facts cites to the evidence found credible by the trial court in rejecting the Morcos Brothers' claims of fraud, bad faith and their implausible interpretation of the parties' contract.

**1. Execution Of The Lease.**

Meridian acquired a former Safeway grocery store location in Puyallup, Washington, renovating the shell into a commercial shopping center called Meridian Place. RP VII 975-76. Respondent Greg Stein [“Stein”] is a member in Meridian and president of Western Front Development, the member-manager of Meridian. RP VI 679.

Phil Davidson or Terry Gordon with Claramont Development, the leasing agent for the property, contacted Stein to inform him that Morcos Inc. was interested in leasing the property. RP VII 976. Although initial negotiations broke down over price, some months later Morcos Inc. sought to re-engage in negotiations. RP VII 977. Mr. Stein became exasperated with the “moving target” created when the Morcos Brothers kept raising new issues, and ultimately asked Mr. Davidson with Claremont to have the Morcos Brothers do a complete mark-up of a draft lease, in order to show all of the changes they desired in one document. RP VII 978-79.

Nader and Nabil Morcos met with Mr. Davidson to discuss changes to the draft Morcos Inc. lease at an Olive Garden restaurant on July 31, 2006. RP I 68-69. The Morcos Brothers insisted that their proposed changes, reflected in Nabil Morcos’ handwriting on the draft

document,<sup>1</sup> be approved by Meridian within 24 hours, or by 3:00 p.m., August 1, 2006. RP I 70. On the morning of the next day, August 1, 2006, Mr. Stein met with the Morcos Brothers to discuss and execute a final lease [the “Morcos Lease”] at a Starbucks coffee house. RP I 81-82.

In the interim, Stein, had been faxed, by Mr. Davidson, the pages of the lease with the “Olive Garden” Morcos Brothers interlineations on them. RP VI 695. Stein marked up these pages to indicate the proposals that were acceptable to the Landlord. RP VI 691-92. He used the marked-up pages to create duplicate originals in black ink (made via a copier), which he took to the Starbucks meeting, so that any further changes made at the meeting, in colored pen, would be distinguishable. RP VI 695-96. The two executed originals were introduced as exhibits below, one, Ex. 112, retained by Stein and one, Ex. 113, by the Morcos Brothers. RP VI 686-88; RP I 92-93.

The parties offered directly contradictory versions of what occurred at the Starbucks meeting. However, the trial court found, in accordance with Stein’s testimony, that the meeting lasted about three hours, during which they repeatedly went over all changes made to the lease with the Morcos Brothers, some at the request of the Landlord, some

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<sup>1</sup> The interlineated “Olive Garden” proposed lease document was introduced as Exhibits 108 and 111 at trial, one copy retained by the Morcos Brothers and one given to Phil Davidson, RP I 80-81.

at the request of the Tenant, in great detail. CP 272; RP VI 717-20. Both Stein and Nabil Morcos initialed each change in the Lease (made before and during the meeting), as well as the bottom of virtually all pages of the lease. RP VI 720-21. They did this twice, on each of the duplicate originals. RP III 409-10; RP VI 720-21. Nabil Morcos signed the Lease as president of Morcos Inc. RP VI 720; RP II 194-95. Both of the Morcos Brothers, including Nader, RP VI 721, signed personal guaranties. Exs. 112 and 113, Ex. H thereto.<sup>2</sup>

The Morcos Brothers are experienced and sophisticated businessmen. Nader Morcos has been in business in the United States since 1990, and has read and signed numerous contracts. RP II 178. He was charged with ensuring the Morcos Lease conformed to the requirements of Mr. Greek, the franchisor to Morcos Inc. RP II 203-04. Nabil Morcos has lived in Pierce County, Washington since the mid-80's

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<sup>2</sup> Nader Morcos did not sign the lease, but he did sign his own personal guaranty of the lease obligations. RP VI 720; RP II 194. He admitted he understood that he was guaranteeing a lease obligation, but asserted that because he did not sign the lease itself, he had not guaranteed anything. RP I 90-91. Nader disputed Nabil's authority, as the president of Morcos Inc., to sign the Lease on behalf of the corporation, but did not direct Nabil, not to sign the lease. RP II 194, 198-99.

Nabil Marcos confirmed that he noticed differences between the Olive Garden and final versions of the lease, and that Mr. Stein assented to certain specific changes that Nabil requested. RP III 407. *See, e.g.*, RP IV 463 (gas supply sufficient for cooking requirements). Nabil testified that his brother, Nader, asked why the final version, Ex. 113, was being signed rather than the Morcos' Olive Garden proposal, Ex. 108. RP III 406-07.

and is a licensed architect, having obtained a professional architectural degree in Egypt and an architectural engineering degree in the United States. RP III 340-41. Nabil Morcos is conversant in English, and fully understood that by initialing a document he was indicating his agreement to handwritten changes. RP III 408. He was not prevented from reading either the final Morcos Lease or anything else he wanted to read prior to signing. RP III 408-09.

**2. The Parties' Actions Or Inactions To Prepare For Occupancy And Operation.**

The Morcos Lease provided a Commencement Date of January 1, 2007, based on the lease definition of the term as 90 days after the Delivery Date [the "Commencement Date"], Ex. 113, section 5.2. Nabil Morcos understood that the tenant was responsible to prepare plans and specifications so that tenant improvements could be installed in the premises prior to the Commencement Date. RP IV 469. The Morcos Brothers' insisted that the Delivery Date under the lease be October 1, 2006 [the "Delivery Date"]. *See* Ex. 108 (the Olive Garden interlineations made by Nabil Morcos), sections 5.1 and 5.2 [the "Commencement Date"], Ex. 113, section 5.2 (January 1, 2007).

Meridian and its representatives made every effort to assist the Morcos Brothers' in preparing plans and specifications, and preparing to do their tenant improvements. *See* CP 277-78.<sup>3</sup> By contrast, the Morcos Brothers did not timely and competently do the work necessary to timely commence and complete their own tenant improvements. As late as December 14, 2006, the Morcos Brothers had not responded to a September 25, 2006 e-mail, Ex. 32, containing the Landlord's comments on preliminary drawings submitted by the Morcos Brothers, and the

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<sup>3</sup> For example, on August 11, 2006, about 10 days after the Morcos Lease was signed, Meridian sent an architectural drawing of the building to Nabil Morcos, with contact information for Meridian's architect. RP IV 470-73. In late August, the landlord's general contractor provided the Morcos brothers original drawings dating back to Safeway's expansion of its store around 1991. Nader Morcos did not return them for approximately a month. RP VII 906-11.

The architect promptly complied with every request made by the Morcos Brothers. RP VII 869-70. The architect sent the Morcos Brothers a soils report two days after they requested one, on October 4, 2006. RP VII 868-69; Ex. 49. On August 23, Nabil received the architect's file. RP IV 475-77. Nabil did not ask for further specifications or plans until September 15. RP IV 477, 490-92. On the very same day, the architect sent him structural drawings and followed up with another e-mail attaching some drawings, and sent all available structural and architectural Auto CAD files on September 20. RP IV 492-95. Nonetheless, Nabil Morcos disagreed with his own expert's opinion that as of September 20, he had everything necessary to prepare the tenant's drawings and plan for submission to the City of Puyallup for approval of a permit for tenant improvements. RP IV 499-500.

Landlord's request for additional information.<sup>4</sup> RP II 242-43. The Morcos Brothers had still not obtained approval of a contractor. RP II 243-44. Nader Morcos confirmed that they had not obtained other necessary steps to operate the space until two or more months after the October 1 Delivery Date, including a loan commitment from Wells Fargo Bank, RP III 282; application for liquor license, RP III 283; proposed contract for external signage, RP III 284; contract to prepare layout drawings for internal furnishings and equipment, RP III 286.

Long before that, the Morcos Brothers knew they were falling behind in their own schedule to begin work on the October 1, 2006 Delivery Date upon which they had insisted. At the Morcos Brothers' request, Mr. Stein offered to move the Delivery Date out 30 days (to October 31, 2006, which in turn, would have delayed the Commencement Date and the associated commencement of rent payments, by the same 30 days). RP VIII 1061-62. Nabil Morcos sent an e-mail indicating agreement with the delayed Delivery Date, Ex. 131, and on September 12,

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<sup>4</sup> The Morcos Brothers attempt to demonstrate Meridian's bad faith by pointing to an e-mail in which Mr. Stein advised Mr. Pickrell to "make sure neither you nor Landlord are 'approving' the dwgs in any way." (App. Br. at 8, *citing* Ex. 29) They fail to cite, however, the rest of the quoted e-mail, which continues, "... other than to say Landlord has no objections as long as code is followed. . . We are not reviewing for code issues. That task belongs to Tenant's architect and City of Puyallup." RP VI 693; Ex. 29. Mr. Stein, an architect, is always careful in how he uses the word "approved" because any approval is only "from a landlord's perspective but we are not approving them as if they meet all codes." RP VI 693.

Mr. Stein sent a proposed addendum to extend the date, Ex. 140, but the Morcos Brothers never executed the addendum. *See* RP VIII 1062.

Meanwhile, Meridian and its contractor, worked to complete the shell renovations. By mid or late September 2006, and certainly by the Delivery Date of October 1, the Morcos Lease premises were ready for construction of tenant improvements to begin. RP VI 757 (Boyd Pickrell, an architect and owner's representative to coordinate tenant improvements); RP VII 897-902 (Patrick Poe, supervisor with landlord's general contractor for the shell work); RP IV 549-50 (Thomas Croonquist, Meridian's expert).<sup>5</sup>

On October 6, 2006, Mr. Pickrell, Meridian's architect, notified the Morcos Brothers in writing that their space was ready for tenant work to commence on October 1. RP VI 770-71; Ex. 161. The letter summarized the matters that still needed to be coordinated, including, the tenant's

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<sup>5</sup> The trial court found Mr. Croonquist credible based on his extensive experience and qualifications as an expert in the field of commercial development and management/coordination of landlord and tenant improvement work, summarized at RP IV 512-17. CP 275-76. Mr. Croonquist testified that the Morcos Inc. space was ready for tenant improvement work on or before October 1, 2006, and in fact, the work could have started in mid-September. RP IV 539.

Morcos Inc.'s expert, Michael Corke, had never coordinated a single tenant buildout, has not (prior to his deposition) visited the building site, and never talked with the owner's project manager, general contractor, or any other non-party who knew the factual status of the Morcos Inc. space as of October 1, 2006 or any relevant time. RP IV 551-52; RP V 633-35

response to landlord comments on preliminary plans for the tenant space, approval of tenant's contractor, the City permit allowing tenant to perform tenant improvements, and resolution of electrical service requirements. RP VI 770-71; Ex. 161. In response, the Morcos Brothers claimed they could only begin their work, including tenant improvements, after the Landlord had completed all of its own work. Meridian or its owner's representative, Mr. Pickrell, responded each time, explaining why the completion of all of landlord's work was not a condition to the Tenant beginning tenant improvements, and offered to assist the Morcos Brothers.<sup>6</sup>

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<sup>6</sup> For example, on October 6, 2006, Nader Morcos asserted the Morcos Brothers could only take delivery of the space after completion of power, sewer, painting of walls, HVAC work, etc. RP VI 774-75, Ex. 163. Mr. Pickrell responded that the Delivery Date only required the premises to be in such condition as reasonably required for commencement of tenant's work, and not completion of all of landlord's work. RP VI 775, Ex. 163. On October 9, Nabil Morcos complained the landlord had not completed insulating the exterior walls and the roof. RP VI 776-77, Ex. 167. Mr. Pickrell again explained that satisfying conditions for the Delivery Date did not require completion of landlord's own work. RP VI 777, Ex. 167.

When the Morcos' Brothers expressed concern that they would not be able to get their own permit for tenant improvements until a new sewer was completed at the property, Mr. Pickrell confirmed that the sewer was proceeding rapidly, and other tenants had been able to obtain permits using the temporary septic system then in place. He offered to assist them in dealing with the city to resolve any permit issue. RP VI 785-87, Ex. 173. Similarly, when the Morcos Brothers suggested the city would not issue a permit until the sprinkler system was completed, Mr. Pickrell pointed out that two other tenants did not have any problem receiving a permit prior to completion of shell improvements, including the sprinkler system, and, again, offered to assist the Morcos' in working with the city. The Morcos Brothers never took him up on the offer. RP VI 787-88; Ex. 174.

It is undisputed that Meridian continued its work on the shell renovation at the same time its tenants were performing tenant improvements. However, it is commonplace for tenant improvements and Landlord shell work to proceed on parallel paths. RP IV 542-43. A tenant, particularly a restaurant tenant, can sensibly and often begin with under-slab plumbing layout and utility work prior to matters such as sheetrock installation, in order to avoid taking down the sheetrock if the work is done incorrectly. *E.g.*, RP VI 755-56; RP IV 542-45. The industry standard for determining whether a space is ready for tenant work to begin is whether the walls delineating the space are in place and the space secure and weatherproof. RP IV 542; RP VII 901, 950. In fact, the Morcos Inc. space was in that condition as of October 1, 2006. *E.g.*, RP IV 542; RP VI 757-58; RP VII 901-02; RP VII 954-55.<sup>7</sup> It was undisputed that two other tenants at Meridian Place – Calloway Fitness and Iron Chef – had obtained permits to begin tenant improvements even

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<sup>7</sup> The Morcos Brothers, (App. Br. 7 and 24), complain that they did not receive a key to the premises until November 2006. As Mr. Poe, the supervisor with Meridian's general contractor testified, however, it is common for access to tenant space to be coordinated via the general contractor and he was at the site on a daily basis at all relevant times (from March 2006 until February 2007). RP VII 911-12; 920. In the very letter advising Morcos Brothers that the premises were ready for their construction to begin, Mr. Pickrell also advised them that access to the site must be coordinated through Pat Poe. Ex. 161 (letter attached thereto), p.3. The Morcos Brothers had trouble gaining access to the site on only one occasion, while Mr. Poe was on the roof of the building, and they did not attempt to call his cell phone. RP VII 912-13.

before October 1, 2006. RP IV 580-81. Calloway Fitness completed its tenant improvements and received a certificate of occupancy in December 2006. RP VII 922. Furthermore, as explained below, the Morcos Brothers in fact started some minor tenant improvement work in December, prior to Meridian's completion of all Landlord's work.

**3. Completion Of Landlord's Work, Lease Commencement; Default And Relinquishment Of Space.**

By December 28, 2006, virtually all of Landlord's work specified in the Morcos Lease was complete. Mr. Pickrell sent an e-mail on that date, Ex. 194, indicating that all of Landlord's punchlist work, Ex. 175, had been completed except for installing a metal shield at the exterior, under-canopy lighting. RP VI 804-06. In response to an e-mail of December 29, 2006 from Nabil Morcos, Mr. Pickrell confirmed that some minor painting, which would likely take only a day or two, was yet to be done. Ex. 196, RP VI 808-09. As of the Commencement Date under the Morcos Lease (90 days after October 1, 2006, or January 1, 2007), the Landlord had substantially completed all of the Landlord's work. RP VII 921-22.

Before the Commencement Date had even arrived, the Morcos Brothers filed a complaint against Meridian and Stein, alleging fraud and breach of contract, on December 4, 2006. CP 1. Morcos Inc. shortly

thereafter began a minimal amount of construction activity, including electrical work, without approval of the Landlord or its contractor, and without having submitted approved plans to the Landlord, evidence of insurance, or a city permit. RP VI 801-03; Ex. 190.<sup>8</sup>

Morcos Inc. refused to pay rent, which was due on the Commencement Date, January 1, 2007, 90 days after the Delivery Date. *See* section 5.2 of the Morcos Lease, Ex. 113, page 8; RP VIII 1013-14. Morcos Inc. also failed to pay one month's prepaid minimum rent, and a security deposit, each of \$13,050, due upon signing the lease. RP VIII 1016-17; Ex. 113, page 3. Morcos Inc. claimed the lease was fraudulent, yet refused to relinquish the space. *See* RP VIII 981.

Ultimately, Meridian decided in February 2007 to evict Morcos Inc. RP VII 981. On March 15, 2007, Morcos Inc. relinquished the space. RP VII 982. To prepare the space for occupancy by a replacement tenant, Meridian had to demolish a substantial portion of a demising wall, tear out a small free-standing partition, and tear out the inadequate electrical work performed by the unauthorized electrical contractor. RP VII 983-85.

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<sup>8</sup> In fact, Morcos Inc. did not submit any structural drawings for their tenant improvements until December 26, 2006. These drawings raised serious concerns as to whether the new footings proposed in the drawings could undermine existing steel columns and existing foundations at the property. RP VI 807-08; Ex. 195. Morcos Inc. claimed that it obtained approval of its drawings from the City of Puyallup on January 5, 2007, but never presented those drawings for the Landlord's approval. RP VII 875.

At trial, Morcos Inc. sought a credit in the amount of an agreed tenant improvement allowance of approximately \$87,000. The Morcos Brothers never produced lien releases or a certificate of occupancy, nor did it ever submit a written invoice asking Meridian Place to pay the tenant improvement allowance. RP VIII 1022. Mr. Stein testified that Meridian Place would not pay a tenant improvement allowance to a tenant until a certificate of occupancy is issued, and lien releases are provided by subcontractors and suppliers. Otherwise, the Landlord could end up having to pay a lien item twice. RP VIII 1021.

**B. Proceedings Below.**

**1. Oral Findings and Conclusions.**

After the close of plaintiff's case at trial, RP VI 729, the trial court granted Meridian and Stein's motion to dismiss Morcos Inc.'s fraud claim, making fourteen separate findings, stated on the record, RP VI 741-43.

On February 23, 2009, the trial court made specific findings and conclusions in an oral decision after trial. CP 268-92. The trial court asked for further briefing on the question whether Morcos Inc. was entitled to an offset for the agreed tenant improvement allowance of \$87,000. CP 292-96. On March 9, 2009, following further briefing, the trial court made further findings and conclusions in denying that offset. CP 391-92. The trial court's Judgment, entered on March 6, 2009,

expressly incorporated its prior findings and conclusions “read into the record.” CP 214.

Marcos Inc. moved for reconsideration of the trial court’s findings on March 16, 2009. CP 217. The trial court denied the motion on March 26, 2009. CP 298.

**2. Pending Criminal Investigation of Judge Hecht.**

On March 16, 2009, Morcos Inc. also filed a motion for new trial, arguing that the trial court, Judge Hecht, had been distracted by an unrelated criminal investigation. Morcos Inc. argued that the very existence of criminal charges filed after the trial court’s decision in the case, called into question his ability to act as a “credible arbiter of justice.” CP 235-38. The trial court referred the matter to the presiding judge, the Honorable Bryan Cuschoff (“successor judge”), who denied the motion on April 17, 2009. CP 397-98, 410-11.

#### IV. ARGUMENT

##### A. **The Trial Court's Incorporation Of Its Oral Findings And Conclusions Is Sufficient To Permit Appellate Review.**

##### 1. **The Morcos Brothers Have Waived Their Demand For Remand For Written Formal Findings.**

The Morcos Brothers' attempt to vacate the trial court's judgment based on a claim that "written findings of fact were never entered by the trial court," (App. Br. 10), comes too late. To the extent the Morcos Brothers desired "written findings of fact," they should have asked the trial court to enter written findings separate from its judgment in their motion for reconsideration. CP 217-26

Civil Rule 52(d) provides that "a judgment entered in a case tried to the court where findings are required, without findings of fact having been made, is subject to a motion to vacate within the time for the taking of an appeal." The Morcos Brothers could have, but failed to timely pursue a motion under CR 52(d) while the trial court was still on the bench. Instead, they sought reconsideration, challenging the substance of the trial court's decision, and specifically asking the court to revise its "findings and conclusions." CP 217. The Morcos Brothers also sought a new trial, not because of a lack of written findings under CR 52(d), but based on a claim that the trial judge was "distract[ed]" during trial because of a pending criminal investigation. CP 237.

The Morcos Brothers' failure to raise this issue in the trial court bars its current argument on appeal. *Dependency of B.S.S.*, 56 Wn. App. 169, 171 n.1, 782 P.2d 1100 (1989), *rev. denied*, 114 Wn.2d 1018 (1990). ("since the [appellant] failed to move to vacate the judgment, the result would have been that the judgment would stand.").

**2. The Trial Court's Judgment Was Its Final Decision On The Merits.**

The trial court entered written findings of fact by expressly adopting its oral decision in its judgment. Even if this court could consider the Morcos Brothers' belated challenge to the trial court's failure to enter formal written findings of fact, their argument that a new trial is required because a successor judge cannot enter the trial judge's findings of fact on remand after the trial judge has resigned is without merit. (App. Br. 11-12, *citing DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999))

In *DGHI*, the trial judge died after making his oral decision, but before he entered judgment and before he signed off on formal findings of fact and conclusions of law. A successor judge signed findings of fact that the trial judge had considered before his death and entered judgment consistent with the trial judge's oral decision.

The Court held that a new trial was necessary because the successor judge could not sign the findings of fact and judgment under CR 63(b) as “a verdict or findings of fact and conclusions of law must be filed before another judge may perform the duties of the prior judge who is disabled by reason of ‘death, sickness, or other disability.’” *DGHI*, 137 Wn.2d at 950-51. The Court held that the oral decision was not sufficient because the prior judge did not “adopt ‘on the record’ the proposed findings and conclusions.” 137 Wn.2d at 950. Further, the Court stated because the prior judge had not indicated “either by explicit statement or by his oral decision, that the decision purported to constitute a ‘written’ opinion which included findings of fact and conclusions of law,” the verbatim record of the trial court's oral decision did not satisfy the requirements of CR 52(a)(4), which permits a written opinion or a memorandum decision if findings of fact and conclusions of law are included. 137 Wn.2d at 947, 951.

This case is entirely distinguishable from *DGHI*. The *DGHI* Court held that a trial court’s oral decision has no “binding effect, unless formally incorporated into findings, conclusions, and judgment” and is “subject to further study and consideration, and may be altered modified, or completely abandoned.” 137 Wn.2d at 944 (quotations omitted). But here, the trial court entered findings and judgment before resigning from

the bench. CP 214-15, 267-96. Further, the trial court here did “adopt on the record” “by explicit statement” his oral decision as his findings of fact and conclusions of law, by incorporating it as part of the judgment: “pursuant to findings of fact and conclusions of law read into the record from time to time, including without limitation the court's findings and conclusions read into the record on February 23, 2009, the court hereby enters this judgment.” CP 214.

Thus, the trial court's oral ruling was more than just “a prior expressed intention to rule in a certain manner.” *DGHI*, 137 Wn.2d at 944. Its judgment was its final decision on the merits and, as the trial court expressly stated, incorporated its findings of fact and conclusions of law. CP 214.

**3. The Trial Court's Oral Decision, Which Was Expressly Adopted By The Trial Court In Its Judgment, Provides A Sufficient Record For This Court To Address The Merits Of The Morcos Brothers' Challenge On Appeal.**

Remand is not necessary for formal written findings of fact because the trial court's findings, which it expressly adopted in its judgment, provide a sufficient record for this court to address the merits of the Morcos Brothers' challenge on appeal. The judgment coupled with the trial court's extensive, recorded oral decision, expressly incorporated into

the judgment, is sufficient for this court to determine what questions the trial court decided and the manner in which they were decided:

The basic purpose and requirements of findings of fact can be summarized: (1) in a case tried to the court, the trial court must make findings of ultimate fact concerning all of the material issues; (2) the trial court is not required to make findings in regard to every item of evidence introduced in a case; (3) the purpose of findings is to enable an appellate court to review the questions raised on appeal; and (4) when it clearly appears what questions were decided by the trial court and the manner in which they were decided, the requirements for findings have been met.

*Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 717, 558 P.2d 821 (1977).

Here, the requirements for findings have been met because the trial court's recorded oral decision, incorporated as findings as part of the judgment, clearly sets forth the trial court's determination on the competing theories of the case. *See Knudsen v. Patton*, 26 Wn. App. 134, 135 n.1, 611 P.2d 1354, *rev. denied*, 94 Wn.2d 1008 (1980) (lack of formal findings "not fatal" when "court's memorandum decision, however, makes clear what questions were decided by the trial court and the theory upon which each was decided"). The Morcos Brothers repeatedly acknowledged below that the trial court's oral decision set out its findings of fact and conclusions of law (CP 217, 236) and have no difficulty in assigning error to specific findings on appeal. (Appendix A to App. Br.)

Washington appellate courts will review the trial court's judgment on the merits if the oral decision is sufficient to address the issues raised on appeal. For example, in *Peoples Nat. Bank of Washington v. Birney's Enterprises, Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989) (App. Br. 11), after admonishing the respondents for failing to obtain written findings, this court nevertheless addressed the merits of the trial court's decision "denominat[ing]" certain portions of the trial court's remarks as findings that were "pivotal to the court's decision." 54 Wn. App. at 671-72.

In *Marriage of Booth*, 114 Wn.2d 772, 791 P.2d 519 (1990), the petitioner challenged a child support order denying the petitioner's requested deviation of his basic child support obligation, which contained no written findings. The Supreme Court held that "in the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court's resolution of the issue." *Booth*, 114 Wn.2d at 777. The Court determined that "[b]ased upon the trial court's oral opinion and its order amending the decree, we find the court did consider the reasons given for deviation in Mr. Griffin's affidavit when it decided not to deviate from the Support Schedule." *Id.*

In *Shelden v. Department of Licensing*, 68 Wn. App. 681, 685, 845 P.2d 341 (1993), the trial court made oral findings but failed to reduce

them to writing. Nevertheless, this court considered the decision on its merits, stating “because the statutory requirements, the record, and the court’s opinion are clear, we will consider its oral findings rather than remand for the entry of formal findings.” *Shelden*, 68 Wn. App. at 685; *see also Backlund v. University of Washington*, 137 Wn.2d 651, 656-57 n.1, 975 P.2d 950 (1999) (“The trial court’s memorandum decision, while lacking in some key respects [no formal findings of fact], is sufficient to address the issue of whether the trial court misapplied the informed consent statute”).

Only where the trial court’s oral decision is so lacking in detail that the appellate court cannot determine what facts have been proved, will the appellate court reverse for lack of findings of fact. For instance, in *State v. Helsel*, 61 Wn.2d 81, 377 P.2d 408 (1962) (App. Br. 11), the Court reversed and remanded a judgment for written findings when the trial court’s oral decision merely stated that “the state had proved its case to his satisfaction and that there was a causal connection between defendant’s conduct and the child’s death, contrary to defendant’s contention.” 61 Wn.2d at 82-83 (“We cannot consider this appeal since, without the findings of fact and conclusions of law, the record of this case does not fully indicate the basis upon which the trial court entered its judgment.”);

see also *State v. Kingman*, 77 Wn.2d 551, 552, 463 P.2d 638 (1970) (reversing when there were no written findings) (App. Br. 11).

Here, by contrast, the trial court made specific findings, which were expressly incorporated in its judgment, from which the appellate court could “determine the basis for the trial court’s resolution of the issue.” *Booth*, 114 Wn.2d at 777. For example, while appellants assert, “The trial court had to determine what the lease agreement provided and whether the lease was ambiguous,” (App. Br. 18), the trial court made extensive findings regarding the lease, its negotiation, and performance:

- The trial court “found that the lease terms were fairly specific.” CP 268. The court then discussed in details the disputed provisions of the lease. *See* CP 268-71.
- The trial court “found that the lease is not ambiguous.” CP 271.
- The trial court found that “the plaintiffs were advised by the broker... to obtain counsel to review the lease. They were on notice. They chose not to have the lease reviewed prior to signing.” CP 271-72.
- With regard to the parties’ experts, the trial court found “[t]he defendant’s expert, Mr. Croonquist, was extremely thorough, knowledgeable, and credible.” CP 275. The trial court found that the plaintiff’s expert “was not credible.” CP 276.
- The trial court found that “[the landlord] worked in good faith to keep the tenant on track.” CP 276.
- The trial court found that “[a]s to the plaintiffs work on the project, I find that they did not work on or proceed on the space in a timely manner.” CP 279.

- The trial court found that “[t]he landlord acted appropriately knowing he would have to mitigate his damages and luckily he had a back-up tenant to fill in, in a timely manner.” CP 283.
- The trial court made specific findings as to how the “plaintiffs materially breached the lease entered into on 8/1/06.” CP 283-85.
- The trial court found that as of the “October 1, ‘06, delivery date, as of that date, the plaintiff had access to the space and the landlord improvement work was substantially done to reasonably allow the plaintiff to start his tenant improvements.” CP 285.

The Morcos Brothers’ challenge to the lack of written findings comes too late. Remand for a new trial is unnecessary because the court’s oral decision was expressly adopted as its findings of fact and conclusions of law in its judgment. Further, remand for entry of formal written findings is unnecessary because the oral decision provides a sufficient record for review of the merits of appellants’ challenge on appeal.

**B. The Court Properly Denied A New Trial Where The Morcos Brothers Made No Showing of Irregularity, Failure To Do Substantial Justice, Or Prejudice.**

**1. The Morcos Brothers Waived The Challenge To The Trial Court’s Capacity To Fairly Consider The Case By Waiting Until After Judgment Was Entered Before Raising The Issue.**

The successor judge properly denied the Morcos Brothers claim that the trial judge’s “distraction during the trial deprived the Morcos Brothers of the right to due process,” (App. Br. 15), and affected his ability to “evaluate the testimony in a calm and dispassionate manner.”

(App. Br. 17) Although the Morcos Brothers were on notice of the fact that the trial court was under investigation during the trial, they waited until it entered an unfavorable judgment before raising the trial court's capacity to fairly consider the case. This issue has been waived.

A litigant must promptly seek recusal upon receiving information that causes that litigant to question the judge's capacity to fairly hear its case. "He may not, after learning of grounds for disqualification, proceed with the trial until the court rules adversely to him and then claim the judge is disqualified." *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wn. App. 623, 626, 524 P.2d 431 (1974).

The Morcos Brothers knew in the middle of trial that the judge was subject to an investigation. They claim to have observed the judge, "visibly upset," discussing a newspaper article with a court reporter during a recess in trial, CP 239-40, and that the trial court commented on the pending investigation during the trial. CP 240. By failing to raise the issue until the trial court ruled against them, they waived any objection to the trial court's capacity to serve.

**2. This Court Reviews The Denial of A New Trial For Abuse of Discretion.**

This court should review the denial of the motion for new trial for abuse of discretion. See *Carikonen v. Columbia & P.S.R. Co.*, 102 Wash. 11, 14, 172 Pac. 816 (1918) (successor judge “is vested with discretion to pass upon a motion for a new trial”). The Morcos Brothers’ motion for a new trial on the ground of “irregularity in the proceedings” did not raise a question of law, as they contend. (App. Br. 14, citing *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968))

In *Detrick*, the trial judge took a defense away from the jury and in doing so, committed legal error because there was evidence to support the defense. *Detrick*, 73 Wn.2d at 808-11. Here, by contrast, whether the trial judge was distracted, and whether this affected his ability to conduct a fair trial, is a question of irregularity in the proceedings that is normally reviewed for abuse of discretion. See *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

**3. The Morcos Brothers Established No Basis For A New Trial.**

The Morcos Brothers cite no authority holding that a pending investigation automatically disqualifies a judge from conducting a fair trial. They failed to establish any irregularity in the proceedings or prejudice requiring a new trial.

In *Commonwealth v. Hewett*, 380 Pa. Super. 334, 551 A.2d 1080, 1081, *app. denied*, 522 Pa. 583 (1988), the court held that the appellant was not denied a “fair and impartial “ based solely on the fact that the trial judge was subject to in an investigation by the Judicial Review and Inquiry Board (JIRB) during the trial. The court held that in order for the appellant to prevail, he was required to “establish there was a nexus between the activities being investigated by the JIRB and the trial judge’s conduct at trial.” 551 A.2d at 1085. The court noted that at the time of trial, regardless of the investigation, the trial court was a “duly commissioned judge with all the right and privileges, which attach to that position.” 551 A.2d at 1085.

As in *Hewett*, the trial court here “retained the authority to preside over [appellant]’s trial” until he was suspended or he resigned. 551 A.2d at 1085. “[W]ithout a showing of specific instances of partiality, bias or prejudice, we will not reverse an otherwise valid verdict based solely on the fact that the trial judge was the subject of an investigation by the JIRB, which later led to the judge’s suspension and forfeiture of office unrelated to that trial.” 551 A.2d at 1085-86.

The Morcos Brothers similarly cite no authority to support their contention that the trial court’s “distraction” deprived them of a fair trial. They rely on the trial court’s isolated comments relating to the media’s

coverage of the an investigation, for instance, recounting how the trial court joked, after spilling water, that nobody should report this fact to the Tacoma News Tribune. CP 239-40. Meridian and Stein’s counsel responded, “it happens all the time.” CP 320. The judicial assistant to Judge Hecht, who was present throughout the trial below, understood the “happens all the time” comment to refer to spilling water, not the News Tribune’s reporting. CP 315-16. The Morcos Brothers cannot show how these events prejudiced them or affected outcome of the trial.

A party’s mere suspicion about the fairness of trial, without evidence of the court’s prejudice, bias, incompetence, or other factual support, does not warrant a new trial. In *Morris v. Nowotny*, 68 Wn.2d 670, 673, 415 P.2d 4 (1966) (App. Br. 16), the trial judge became emotionally involved in the case, moved by empathy toward a party. Here, by contrast, there is no evidence of emotional involvement or of any bias whatsoever. While the Morcos Brothers argue that there “is at least reasonable doubt whether the Morcos Brothers received a fair trial in front of Judge Hecht,” (App. Br. 17), without any showing that the trial court’s rulings demonstrate irregularity or a failure to do substantial justice, the Morcos Brothers do not even make a *prima facie* case to consider the granting of a new trial.

The record refutes the Morcos Brothers' contention that the judge was distracted to the point of impairing his ability to conduct a fair trial. Judge Hecht allowed all witnesses to testify, rarely restricted their testimony, competently made evidentiary rulings, methodically took and reviewed over 500 pages of notes, and prior to ruling, spent two and one-half days to review his notes and the exhibits. CP 320-21, 392. When the Morcos Brothers filed a motion for a new trial, Judge Hecht readily agreed it would be appropriate for the motion to be heard by a different judge. CP 397-98.

The *Hewett* decision is consistent with Washington law. The decision to grant a new trial entails considerations regarding the “complexity of the issues, the length of the trial, the degree and nature of the prejudicial incidents, the nature and amount of the verdict, the cost of retrial, the probable results, the desirability of concluding litigation, and such other circumstances as may be apropos to the particular situation.” *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 440, 397 P.2d 857 (1964). Not only error, but also prejudice must be shown to justify a new trial; an error not affecting trial outcome does not mandate a new trial. *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 561, 815 P.2d 798 (1991). The Morcos Brothers established neither.

To the contrary, ordering a new trial after a 9-day trial, conducted after two years of litigation at a cost to Meridian and Stein exceeding \$140,000 in legal fees, expert witness fees and costs, CP 322, with no showing of error or prejudice, would itself be a failure to render substantial justice. The court clearly acted within its discretion in denying a new trial to the Morcos Brothers.

**C. The Trial Court Properly Interpreted The Lease, Finding That The Landlord Delivered the Premises On The October 1 Delivery Date.**

While the Morcos Brothers contend it is “not clear from the record, how the trial judge interpreted the lease provision regarding delivery date,” (App. Br. 18), the trial court found that section 5.1 of the lease “clearly stated that the commencement date was on or about January 1, ’07.” CP 268. The trial court concluded the Delivery Date to be different from the Commencement Date under the lease: “[Lease section] 5.2, that the commencement date would be 90 days after the delivery and the delivery date shall be 10/1/06.” CP 268. The trial court found, that “as of [the October 1, 2006 Delivery Date], the plaintiff had access to the space and the landlord improvement work was substantially done to reasonably allow the plaintiff to start his tenant improvements.” CP 285.

The Morcos Brothers contend, first, that the trial court erred in finding that the Lease was not ambiguous. CP 271. (App. Br. 18) How-

ever, given the trial court's extensive findings interpreting the lease, it is unclear how that issue affects the trial court's decision or prejudices them, given the court's extensive findings interpreting the lease in its entirety.

In any event, a written instrument is not ambiguous merely because the parties suggest opposite meanings. *Stranberg v. Lasz*, 115 Wn. App. 396, 402, 63 P.3d 809 (2003), citing *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). Courts give words their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent. *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 783, 211 P.3d 448 (2009).

Here, the trial court properly read the lease as a whole, and construed it to give effect to each provision. See *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007) (App. Br. 19). In arguing that the trial court should have held that the Landlord was required to complete *all of the Landlord's work* before the Delivery Date, the Morcos Brothers conflate the lease definition of "Delivery Date" with the concept of "substantial completion." The term, "Delivery Date," was specifically agreed by the parties (as insisted by the Morcos Brothers), to be October 1, 2006. It is defined to be the date on which the premises are delivered in such condition as reasonably required for the *commencement* of Tenant's Work under the lease:

## 5.2 Commencement.

Delivery date shall be on 10/1/06 [interlineated]. The *Lease Term* shall begin (the “*Commencement Date*”) on the first to occur of (i) ninety (90) days after the Delivery Date, or (ii) the date *Tenant* opens the *Premises* for business to the public. **“*Delivery Date*” shall mean the date that the *Premises* will be delivered to *Tenant* in such condition as is reasonably required for the commencement of *Tenant’s Work*.** Notwithstanding the foregoing, however, if *Landlord* is unable for any reason to deliver possession of the *Premises* to *Tenant* prior to the estimated *Commencement Date* set forth in Subsection 5.1, *Landlord* shall not be liable for any damages caused thereby, this *Lease* shall not thereby be or become void or voidable, but in such event, the *Commencement Date* shall be delayed for a like period of time, unless such ability of *Landlord* to deliver possession of the *Premises* was caused by actions of *Tenant* or *Tenant’s* agents. In such cases where *Tenant* or *Tenant’s* actions caused *Landlord* to delay delivery of possession of the *Premises* to *Tenant*, such delays shall not otherwise change the *Commencement Date*.

(Ex. 113, emphasis added, italics in original). The plain language of section 5.2, therefore specifies that the “*Delivery Date*” can occur prior to completion of all of the *Landlord’s* work, so long as the premises are in a reasonable condition for the *Tenant* to begin its own work.

The Morcos Brothers also argue that “The lease agreement also provided that “*Tenant’s Work*” could commence only after the landlord substantially completed its work,” (App. Br. 20), but misinterpret what “substantial completion” means under the Lease. Section 12.1(c) authorizes the *Tenant* to begin work when the *Landlord* completes its work “to such a condition as is reasonably required for the commencement

of Tenant's Work, as determined by *Landlord's* architect, owners representative, or contractor:"

12. CONSTRUCTION.

12.1 Landlord's Work.

(a) Construction of Building and Shell. . . . *Landlord* agrees, prior to the *Commencement Date*, at *Landlord's* sole cost and expense, to constructed on the site of *Parcel 1*, a building in which the *Premises* are to be located. The *Premises* shall be constructed in substantial accordance with the outline specifications in Exhibit D attached hereto entitled and hereafter referred to as "*Landlord's Work*."

...

(c) Notice of Substantial Completion. When *Landlord* has substantially completed *Landlord's Work* to such a condition as is reasonably required for the commencement of *Tenant's Work*... *Landlord* shall notify *Tenant* in writing to the effect....

Section 12.1(c) is perfectly consistent with section 5.2 by requiring only that the premises be in condition for Tenant to begin its work without regard to whether the landlord has completed all of the Landlord's Work under the lease.

The Morcos Brothers also argue that the trial court failed to read section 5.2 together with section 12.2. But section 12.2 only confirms that the Delivery Date is a date different from the date of substantial completion of Landlord's Work:

12.2. Tenant's Work.

"*Tenant's Work*" as that term is used herein, shall mean and include all aspects of the work to be performed by *Tenant* set forth in Exhibit D. *Tenant*, without the payment of any additional rent hereunder, but subject to all of the other terms and conditions of this *Lease*, **shall have the right to early occupancy of the Premises after the date of Landlord's notice of substantial completion in order to perform Tenant's Work**, so far as its occupancy thereof is not inconsistent with any work that must be done in the *Premises by Landlord*, as determined by *Landlord*. *Tenant* agrees, **prior to the Commencement Date**, as calculated in Subsection 5.2, to perform all fixturing work and other work constituting *Tenant's Work*...

Ex. 113 (emphasis added, italics in original). This provision specifically contemplates the possibility of ongoing work being done by Landlord by stating that the Tenant's right to early occupancy without payment of rent is "so far as occupancy thereof is not inconsistent with any work that must be done in the *Premises by Landlord*, as determined by *Landlord*."

Section 12.2.

In sum, the term "Delivery Date" is not defined by reference to *completion* of Landlord's Work, nor does any provision in the Morcos Lease make the term dependent upon completion of Landlord's Work. The trial court properly construed the Morcos Lease to provide that on the Delivery Date, the Landlord is required to deliver the premises in the condition reasonably required for the commencement of Tenant's Work.

By contrast, the Morcos Brothers urge a tortured construction that would render entire portions of the Morcos Lease a nullity. For instance, if all Landlord's Work were required to be completed prior to delivery to the tenant for Tenant Work to begin, there would be no need to separately define "Commencement Date" and "Delivery Date," since they would be measured by the same act: completion of the Landlord's Work such that full possession can be delivered to the tenant.

The Morcos Brothers argue that the Delivery Date never occurred, citing cases that require possession to be delivered to a tenant, before the law imposes upon the tenant the obligation to pay rent. *See Draper Machine Works, Inc. v. Hagberg*, 34 Wn. App. 483, 486, 663 P.2d 141 (1983) (App. Br. 22); *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn. App. 495, 503, 962 P.2d 824 (1997) (App. Br. 22). Here, however, no one disputes that the Morcos Brothers would not be liable for rent if full possession had been denied. The parties expressly contemplated that the Morcos Brothers could take early possession by the Delivery Date, occupying the premises before paying rent solely for the purpose of performing tenant improvements. The Delivery Date did not result in the Lease Term commencing, or the commencement of monthly rent obligations. Ex. 113, sections 12.2 and 5.2. This court should reject the Morcos Brothers' strained construction of the lease, which would

require full possession to be delivered before tenant improvements are even begun, and nullifies section 12.2, providing for “early” possession without payment of rent.

The Morcos Brothers’ argument that the entirety of the Landlord’s Work was not complete as of October 1, 2006, (App. Br. 23-24), is irrelevant because the parties contemplated that Landlord’s Work would proceed on a parallel path with Tenant’s Work following the Delivery Date. Moreover, the trial court’s finding that the Landlord’s Work was “substantially done to reasonably allow the plaintiff to start his tenant improvements” on October 1, 2006, CP 285, was supported by substantial evidence. As of and prior to October 1, 2006, the premises were weatherproof, secure, with walls delineating the space in place, and ready for commencement of tenant work. RP VI 757-58 (Pickrell, owner’s representative); RP VII 897-902 (Poe, supervisor with landlord’s general contractor); RP IV 539 (Croonquist, Meridian’s expert).

Substantial evidence also supports the trial court’s findings that Meridian was prepared to deliver the premises for full possession by Morcos Inc., and that the lease term would commence and Morcos Inc would become liable for rent, on the January 1, 2007 Commencement Date as contemplated by section 5.2 of the Lease. Morcos Inc. was not in position to accept delivery of possession and commence operations

because it failed to take timely steps to hire professionals (even the basic requirement of hiring and submitting for landlord approval, contractors), submit plans for the tenant improvements and respond to Landlord's comments and questions, apply for and obtain a City permit to perform tenant improvements, apply for and obtain tenant's insurance, obtain and submit timely plans for signage, etc. *See* CP 279 ("I find that [Morcos Inc.] did not work on or proceed on the space in a timely manner"); CP 279-81 (examples of the Morcos Brothers' delay); *see* §§ III.A.2, 3 *supra* (further examples of the Morcos Brothers' delay and ineptitude).

In summary, the Delivery Date was clearly and unambiguously October 1, 2006. Overwhelming evidence supports the trial court's finding that as of that date, Meridian had prepared the premises as necessary to allow Morcos Inc. to begin its tenant improvements. Meridian did nothing to cause delay of Morcos Inc.'s own work to build out the tenant space for ultimate occupancy and operation by Morcos Inc., and any inability of Morcos Inc. to take possession and begin paying rent as of the targeted January 1, 2007 Commencement Date was the fault of Morcos Inc. This court should affirm the judgment below.

**D. Morcos Inc. Did Not Prove That Meridian Committed A Material Breach Of The Lease Excusing Morcos Inc.'s Failure To Perform Or That It Was Entitled To An Offset For Tenant Improvements.**

The trial court also correctly rejected Morcos Brothers' argument that Meridian breached the Morcos Lease by failing to approve Morcos Brothers' drawings for tenant improvements and failing to pay them their tenant improvement allowance. This court should similarly reject Morcos Brothers' contention they were "relieved. . . of the obligation to pay rent," (App. Br. 25)

Meridian did not breach the lease. The Morcos Brothers' failure to timely submit drawings for approval was their own fault, not the result of some scheme by Meridian to withhold approval. On September 25, 2006, the landlord provided comments and requests for further information in response to Morcos Brothers' preliminary drawings. Ex. 32. The Morcos Brothers *never* responded. RP II 243. Indeed, even when the Morcos Brothers belatedly obtained a City of Puyallup permit for tenant improvements in January 2007 (after the Commencement Date), the Morcos Brothers did not submit to Meridian the drawings it used to obtain that permit. RP VII 875. The trial court's finding that "the delays in completing the tenant improvement was [sic] caused by the plaintiffs," CP 285, is well-supported and must be affirmed.

The only issue raised by the Morcos Brothers as to the calculation of damages below, is whether Morcos Brothers were entitled to an offset for the tenant improvement allowance of approximately \$87,000. While the appropriate measure of damages in a contract action may be a question of law reviewed de novo, (App. Br. 25-26), the determination or calculation of damages is a question of fact. See *Sherman v. Kissinger*, 146 Wn. App. 855, 873-74, 195 P.3d 539 (2008).

Nothing in the lease required Meridian to pay Morcos Inc. cash for the agreed tenant improvement allowance, even *before* Morcos Inc. did its tenant improvements. Neither Morcos Inc.'s obligation to perform tenant improvements, nor its obligation to pay rent, was conditioned on payment of the tenant improvement allowance by Meridian.<sup>9</sup>

The trial court found that Morcos Brothers did “next to nothing to get the property ready” and the landlord had “no obligation whatsoever to get \$87,000 to the Morcoses.” CP 391-92. It was undisputed that the customary practice is to pay tenant improvement allowances only when tenant improvements are complete, a certificate of occupancy is obtained, and any liens are released. RP VIII 1021. As a practical matter it would make no sense to credit a tenant improvement allowance to a tenant who

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<sup>9</sup> The Morcos Brothers did not need the money in order to start tenant improvements. The Morcos Brothers' had a loan commitment from Wells Fargo Bank but didn't take the money “[b]ecause we have the cash.” RP III 282.

doesn't perform the tenant improvement work. The trial court's findings are supported by substantial evidence and therefore should not be upset on appeal. See *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

Here, Meridian was able to mitigate its damages by obtaining a replacement tenant. The damages awarded at trial took into account this mitigation of Meridian's damages. See Ex. 216; RP VIII 1065-94. The replacement tenant's lease had a different negotiated rent structure (\$32 per square foot plus percentage rent clause that could result in additional rent depending on economic performance of the tenant) than the Morcos Lease (\$36 per square foot with no additional rent). RP VIII 1067. There was therefore a shared risk; the replacement lease with additional percentage rent might "potentially get [the Landlord] to \$36, or beyond, depending on how well [the replacement tenant] did with his restaurant." RP VIII 1067.

In *Hargis v. Mel-Mad Corp.*, 46 Wn. App. 146, 730 P.2d 76 (1986), Division Three held that where, as here, a lease is surrendered, a defaulting tenant is "not entitled to a credit for the excess rent the landlord receives from a subsequent tenant toward the unpaid rent owed by the original tenant for the period of time the property was vacant." *Hargis*, 46 Wn. App. at 153. Likewise, the defaulting tenant is not entitled to set off

such excess rent against costs incurred by the landlord to attract new tenants:

First, [tenant's] damages are, in fact, mitigated to the extent it was relieved from further rent payments. . . . Second, crediting the tenant's obligation to pay with the greater rent is unfair as the possibility of the landlord's receiving this future rent is speculative. . . . If there is an inequity that, by virtue of the facts of this case, must fall on either of the parties, we have decided that it should fall on the party who breached the lease. The defaulting tenant should not get the benefit of his breach. It is clear the landlord promptly moved to mitigate the tenant's damages. Fairness dictates that excess rent belongs to him and not the defaulting tenant.

*Hargis*, 46 Wn. App. at 154 (internal quotation omitted).

Here, the *Hargis* rationale applies. The amount of future rent to be received by Meridian is speculative, depending in part on percentage rent, which in turn depends on the tenant's economic performance. The trial court found, with ample support in the record, that Morcos Inc. breached the lease and caused their own damage. Moreover, the Landlord received virtually no benefit of tenant improvements, which would have, at end of the lease term, become the Landlord's property had the lease been performed. Ex. 113, sections 21.1 and 37. As in *Hargis*, any inequity must fall on the party that breached the lease, here Morcos Inc. 46 Wn. App. at 154.

The Morcos Brothers' reliance on *Platts v. Arney*, 50 Wn.2d 42, 309 P.2d 372 (1957), is misplaced. *Platts* involved a sale and exchange of property, and a simple calculation in which once the court found the values of the property to be exchanged, it could determine damages by comparing the values of the property, and subtracting a \$5,000 broker's commission which plaintiff would have incurred to complete its own performance. *Platts*, 50 Wn.2d at 44-45. There was no element, as here, of ongoing rent payments from a replacement tenant, the amount and certainty of which are speculative. Here, unlike the situation in *Platts*, had the tenant improvement allowance been paid toward its intended purpose, Meridian would have at least some benefit from the vesting of improvements to the property in Meridian at expiration of the Lease.

**E. The Trial Court Properly Dismissed Morcos Inc.'s Claim For Rescission Based On Fraud.**

The trial court, acting as finder of fact in a bench trial, dismissed Morcos Brothers' fraud claim, after Morcos Brothers rested their case, RP VI 728-29, 741-44. The trial court properly exercised its authority to weigh the evidence and, in fourteen enumerated findings, found Morcos Brothers' claims deficient under CR 41(b)(3).

Under CR 41(b)(3), "The court as trier of the fact may then *determine* them and render judgment. . . If the court renders judgment on

the merits against the plaintiff, the court shall make findings as provided in rule 52(a). . .” This rule recognizes that the trial court is the ultimate finder of fact and is not taking the opportunity to weigh evidence or judge credibility away from a jury. The correct standard of review when the trial court determines facts and makes findings under CR 41(b)(3), as it did here, RP VI 741-43, is “whether substantial evidence supports the trial court’s findings and whether the findings support its conclusions of law.” *Dependency of Schermer*, 161 Wn.2d 927, 940, 169 P.3d 452 (2007) (App. Br. 29).

Morcos Brothers cites *Willis v. Simpson Inv. Co.*, 79 Wn. App. 405, 410, 902 P.2d 1263 (1995) for the proposition that involuntary dismissal under CR 41 is proper only “if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff.” (App. Br. 29) But as the Court of Appeals noted, *Willis* was a jury trial, governed by CR 50(a)(1). 79 Wn. App. at 410. Although the court, in *dicta*, stated that the standard for dismissal is the same under both CR 41(b)(3) (dismissal in bench trials), and CR 50(a)(1) (motions for judgment as a matter of law in jury trials), that is true only where the trial court fails to make findings and does not weigh the evidence as it did here. *Schermer*, 161 Wn.2d at 939-40.

In arguing that the trial court erred here, the Morcos Brothers allege that Greg Stein stated that all copies of the lease present at the Starbucks meeting were “exactly the same.” (App. Br. 30) From this, the Morcos Brothers argue that Nabil Morcos’ failure to carefully compare the changes between Ex. 108 (the Olive Garden proposal containing the Morcos Brothers’ proposed changes) and Exs. 112 and 113 (the final Morcos Lease signed at the Starbucks meeting the next day) was reasonable. (App. Br. 30)

The court’s findings, RP VI 741-43, are amply supported by substantial evidence summarized *supra* at section III.A.1. Further, this court must affirm the trial court’s dismissal on the single ground that the Morcos Brothers did not reasonably and justifiably rely on any representation by Stein or Meridian to the effect that Exs. 112 and 113, the final Morcos Lease, were identical to the Morcos Brothers’ initial Olive Garden proposal, Ex. 108. Whether for fraud or other actionable misrepresentation, the plaintiff must show that he or she justifiably relied on the representation and cannot claim reliance by failing to read a document:

It requires little in the way of diligence to ascertain the truth of a representation made as to the legal effect of plain and unambiguous documents which a party has opportunity to read. A party generally cannot escape the duty of reading the documents (the duty to ‘investigate’ by simply

reading the documents in order to know their contents) in the absence of a showing that he or she was unable to read or understand the language used, that there was a special relation of trust and confidence in the representing party, that some artifice was employed to obtain his or her signature, or that something was done to prevent his or her reading the document.

***Skagit State Bank v. Rasmussen***, 109 Wn.2d 377, 385, 745 P.2d 37 (1987).

Nabil Morcos, who signed the Morcos Lease as president of Morcos Inc., admitted that he noticed differences between the Olive Garden proposal, Ex. 108, and the final Morcos Lease, Exs. 112 and 113, even appearing on the very first page. RP III 407. He requested and made changes to the final Morcos Lease and initialed those changes at the Starbucks meeting when the Morcos Lease was finalized and signed. RP IV 463-64. He obtained an architectural engineering degree in the United States and is a licensed architect. RP III 340-41. He understands English and admitted no one prevented him from reading the Lease that he signed. RP III 408-09. Plainly, even assuming *arguendo* that Mr. Stein made the disputed representation alleged by the Morcos Brothers, any reliance on such representation, and willful decision not to read the very lease before them or the provisions that Nabil Morcos admittedly initialed, was unjustified. This court must affirm the dismissal of the fraud and misrepresentation claims.

**F. Meridian, Not Morcos Inc., Is Entitled To Attorney's Fees As Prevailing Party.**

The Morcos Lease contains an attorneys' fees clause, which provides that the prevailing party is entitled to fees and costs, and defines "Prevailing Party" to include the party who "receives from the other party the sums allegedly due, . . . consideration substantially equal to that which was demanded, or substantially the relief or consideration sought. . ." Ex. 113 at section 48. This court should award Meridian and Stein their fees and costs on appeal. RAP 18.1. Morcos Inc., Nader and Nabil Morcos are each liable for those fees under the Lease and their personal guaranties. Ex. 113 at Ex. H.

**V. CONCLUSION**

This court should affirm the decision below in its entirety and award of fees and costs on appeal to Meridian and Stein.

DATED this 30th day of December, 2009.

BUCKNELL STEHLIK SATO  
& STUBNER, LLP

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

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WSBA No. 13633

By: \_\_\_\_\_  
Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Respondents

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**V. CONCLUSION**

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DATED this 30th day of December, 2009.

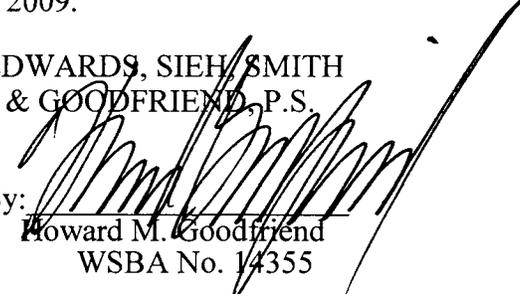
BUCKNELL STEHLIK SATO  
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By:

  
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Jerry N. Stehlik  
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Attorneys for Respondents

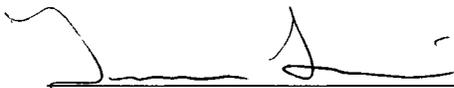
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 30, 2009, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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Kevin T. Steinacker Thomas Dickson 1425 Wells Fargo Plaza 1201 Pacific Avenue Tacoma WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jerry N. Stehlik Bucknell Stehlik Sato & Stubner, LLP 2003 Western Avenue, Suite 400 Seattle WA 98121	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

**DATED** at Seattle, Washington this 30th day of December, 2009.

  
\_\_\_\_\_  
Tara D. Friesen

NOTED  
STATE OF WASHINGTON  
BY: [Signature]  
12/30/09 10:05:00 AM  
COURT OF APPEALS - DIVISION II

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No. 39157-1-II

COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

MORCOS BROTHERS INC.,  
a Washington Corporation  
d/b/a Mr. Greek  
Mediterranean Grill,

Appellant,

v.

MERIDIAN PLACE LLC, a  
Washington Limited Liability  
Company; GREG STEIN, an  
individual,

Respondents.

DESIGNATION OF  
EXHIBITS

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF PIERCE

MORCOS BROTHERS INC., a  
Washington Corporation d/b/a Mr. Greek  
Mediterranean Grill,

Plaintiff,

v.

MERIDIAN PLACE LLC, a Washington  
Limited Liability Company; GREG STEIN,  
an individual,

Defendants.

No. 06-2-13662-0

DESIGNATION OF EXHIBITS

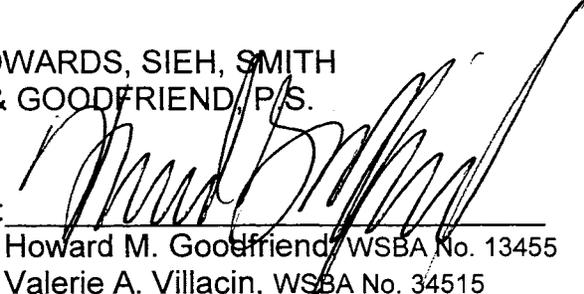
TO: Transcript Clerk

Please prepare for transmittal to the Court of Appeals, Division II, Cause No. 39157-1, the exhibits listed below. I understand that upon receipt of acceptable payment the Clerk will transmit the exhibits to the appropriate court. I agree to pay the amount owed within 14 days of receiving a copy of the index, regardless of the status of the appeal. If you have any questions, please contact Howard M. Goodfriend at (206) 624-0974. Thank you.

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DATED this 30th day of December, 2009.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend, WSBA No. 13455  
Valerie A. Villacin, WSBA No. 34515

Attorneys for Defendants/Respondent

Exhibits

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Exhibit  
Number

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Tara D. Friesen